Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Companies	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

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INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1996 Telecommunications Act[1] ("the Act" or "the 1996 Act"), Congress sought "to open the local services market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a variety of telecommunications offerings."[2] For six years, the Federal Communications Commission ("FCC" or "the Commission") has sought to carry out the goals of the Act by promoting policies to encourage competitive entry and break down monopoly barriers. The Commission's policies have begun to bear fruit in New York and other parts of the country.

However, in this pending Notice of Proposed Rulemaking ("NPRM") the FCC contemplates potentially radical changes in its policy with respect to the statutory requirement that incumbent local exchange carriers ("ILECs") provide competitors ("CLECs") with unbundled access to network elements.[3] That requirement is a critical component of the 1996 Act's competitive market strategy. The contemplated changes in regulatory policy and perspective, if adopted, would frustrate the key purpose of the Act, undermine the ability of

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[1] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), codified as 47 U.S.C. §151 *et seq*.

[2] *In the Matter of the Application of BellSouth Corporation et al., for Provision of In-region, InterLATA Services in Louisiana*, CC Docket No. 98-121, *Memorandum Opinion and Order*, 13 FCC Rcd. 20599,¶ 3 (October 13, 1998).

[3] *See* Sections 251, 252 and 271 of the Act. Section 153(29) of the Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

CLECs to compete and damage the prospects for competitive telecommunications markets.

In the 1996 Act, Congress required all ILECs to make their bottleneck facilities available to competitors through resale of local telephone service and through the wholesale provision of unbundled network elements ("UNEs"), which CLECs use to serve residential and business consumers.[4] The Act also sought to expand investment in modern telecommunications facilities by both CLECs and ILECs.[5]

Over the six years since passage of the Act, considerable groundwork has been laid at both the federal and state levels for the development of local telephone service competition. The Commission's orders established a basic list of UNEs that must be offered to CLECs, and allowed state regulators to refine these UNE requirements to better meet local circumstances.[6] The FCC rules provide the framework for state regulators to set specific wholesale rates using forward-looking cost principles that enable CLECs to compete while paying ILECs a fair price for the use of those network elements leased to serve CLEC customers.[7] Using the FCC's cost

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[4] The Act §§ 251, 252.

[5] The Act further provides that regional Bell operating companies ("RBOCs")--those ILECs that were formerly part of the Bell system--who took specific local market opening steps would be granted the right to offer long distance service to their in-region customers, thus lifting the 1984 market restrictions imposed as part of the AT&T divestiture. The Act § 271.

[6] *See*, *e.g.*, CC Docket Nos. 96-98 and 95-105, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, released November 5, 1999, 15 FCC Rcd 3696 ("*UNE Remand Order*").

[7] Total element long-run incremental cost ("TELRIC") pricing determines the forward-looking cost of building and operating a modern efficient network and apportions this cost for each component network element, or UNE. Recently, the United States Supreme Court upheld the FCC's decision that UNEs be offered at TELRIC rates, thereby settling some of the numerous

principles, the New York State Public Service Commission ("NYSPSC") recently ordered new, lower UNE rates to apply in New York.[8]

As a result of these coordinated federal and state regulatory policies, local service competition has progressed in New York and elsewhere.[9] Numerous CLECs have entered local markets in New York and now serve approximately 27% of access lines[10] within Verizon-NY's service territory.[11]

In this NPRM, the Commission seeks to review its unbundling policies in light of current conditions, and requests comment on whether changes to the requirements are appropriate. The

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challenges to the Act's constitutionality as well as the Commission's interpretations of the § 251 UNE requirements. The Court held, "[t]here is no evidence that the [FCC's] decision to adopt TELRIC was arbitrary, opportunistic, or undertaken with a confiscatory purpose." *Verizon v. FCC*, 535 U.S. ___, 122 S.Ct 1646, 13, syllabus point 1.(C), decided May 13, 2002. This ruling has reduced some of the uncertainty surrounding the viability of CLECs that, as the Act intended, have leased UNEs to enter local markets formerly controlled by ILEC monopolies.

[8] NYSPSC Case 98-C-1357, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Order on Unbundled Element Rates*, issued and effective January 28, 2002.

[9] In December 1999, the first RBOC was granted § 271 approval in New York and began offering in-region long distance service in January 2000. CC Docket No. 99-295, *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order,* adopted December 21, 1999.

[10] Within New York, Verizon's service territory contains approximately 12.2 million access lines (90% of the state's total telephone lines). Forty-four other ILEC service territories make up the remaining 10% of lines in New York. *See* NYSPSC *Analysis of Local Exchange Service Competition in New York State,* (as of December 31, 2000), *http://www.dps.state.ny.us/telecom/rankbyal.htm*.

[11] NYSPSC Case 00-C-1945, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, February 2002 NYSPSC Staff testimony, p. 14, lines 15-19.

Commission seeks to examine how well its UNE rules have worked to date, and whether they should be continued, revised, limited or sunsetted in any respect. The Commission also seeks comment on whether it should continue to require ILECs to supply CLECs with access to the high-frequency portion of local loops, a UNE used to deliver digital subscriber line service ("DSL") to customers seeking high-speed Internet access over telephone lines.

The NPRM threatens to reduce or eliminate many of the statutorily-mandated unbundling obligations of the incumbent local exchange carriers and to create unwarranted exemptions to those obligations in the guise of expanding broadband deployment. The NPRM's analysis indicates that the FCC may move precipitately to minimize and to disfavor CLEC access to unbundled network elements, at the very moment when regulatory reaffirmance of a strong pro-competition policy is called for. The NPRM appears to ignore the fact that local telecommunications competition is still in its early stages, and that residential and small business customers, in particular, have yet to enjoy the benefits of fully competitive local markets.

Eighty-six parties filed initial comments with the Commission. Some of the commenters recommended that the FCC scale back or set time limits on UNE availability, while others sought expansion of UNE offerings.

In these reply comments, the New York State Attorney General ("NYSAG") urges the Commission to stay the course, to keep the current list of available UNEs, and not to limit, restrict or sunset any UNEs at this time. State regulators should continue to be able to expand the UNE list to meet local market needs and conditions. Additionally, the FCC should continue to make the high-frequency portion of the local loop available to competitors providing DSL.[12]

To tamper significantly with UNE availability at this time would impair CLECs, cripple local competition and be contrary to the goals and requirements of the Act.

THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST

The NYSAG is an advocate before federal and state regulatory agencies on behalf of New York consumers, especially residential and small business telecommunications customers. The NYSAG also enforces federal and state antitrust and consumer protection laws. The NYSAG has been an active party in proceedings relevant to the subject of this NPRM before the FCC and the NYSPSC, including, Bell Atlantic-New York's § 271 filing before the FCC[13] and the NYSPSC § 271 proceedings,[14] as well as related NYSPSC proceedings which developed UNE rates,[15] line-

[12] Since the NPRM was released and initial comments filed, the U.S. Court of Appeals for the District of Columbia Circuit has remanded to the FCC two relevant prior Commission orders. *USTA v. FCC*, 290 F.3d 415 (D.C. Circuit, May 24, 2002). The NYSAG concurs in the government's recent decision to seek a rehearing and agrees that the court's ruling is fundamentally "in tension" with *Verizon v. FCC, supra. See Brief of U.S. Department of Justice and Federal Communications Commission on Petition for Rehearing or Rehearing En Banc (USTA v. FCC, Docket Nos. 00-1012, 0-1015, D.C. Cir.)*, dated July 8, 2002.

[13] *See, e.g.,* NYSAG October 19, 1999 *Initial Comments* (*http://www.oag.state.ny.us/ telecommunications/filings/bell_atlantic/comments/index.html*) and November 8, 1999 *Reply Comments (http://www.oag.state.ny.us/telecommunications/filings/bell_atlantic/reply/index.html*) filed in CC Docket 99-295, *supra.*

[14] *See, e.g.*, NYSAG July 23, 1999 *Comments On Bell Atlantic-NY's Proposed Performance Assurance Plan and Change Control Assurance Plan*, NYSPSC Case 97-C-0271. *See also,* NYSAG February 10, 2000 *Comments On Bell Atlantic-NY's Revised Proposed Performance Assurance Plan*, NYSPSC Case 99-C-0494.

[15] *See* NYSAG June 18, 2001 *Brief On Exceptions To Recommended Decision*, (*http://www.oag.state.ny.us/telecommunications/filings/psc_on_ wholesale_une_rates.html*), and July 12, 2001 *Exceptions Reply Brief (http://www.oag.state.ny.us/telecommunications/filings /pricing_une.html*) filed in NYSPSC Case 98-C-1357, *supra.*

sharing[16] and line-splitting[17] requirements for Verizon-New York.[18]

Transforming monopoly markets into competitive markets, with their accompanying innovation, efficiencies and opportunities for customer choice, is important to consumers, businesses, and the New York State and New York City economies. For this reason, the Attorney General has consistently advocated for pro-competition policies in numerous state and federal telecommunications regulatory proceedings.

ARGUMENT

I. UNEs Are An Important Mode Of Entry For The Development Of Competitive Local Telecommunications Markets.

In reviewing its policies and requirements regarding UNEs, the Commission's NPRM seeks "evidence regarding actual marketplace conditions" to inform its "understanding of how the Commission's unbundling rules have shaped the market to date."[19] In this regard, it is instructive to review the experience of New York's local markets since the 1996 Act was passed.

According to NYSPSC Staff, "[a]s of January 1, 2002, there were approximately 3.3 million local access lines served by [CLECs] operating in Verizon's territory . . . represent[ing]

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[16] Line-sharing involves CLEC provision of DSL on an ILEC voice line.

[17] Line-splitting involves CLEC provision of DSL on a CLEC voice line.

[18] *See, e.g.,* NYSPSC Case 00-C-0127, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, August 15, 2000 NYSAG *Brief On Issues Consolidated For Litigation Track.* The New York PSC proceeding convened an industry-consumer-government collaborative process to address issues capable of reaching a consensus and also provided for litigation of other issues, resulting in Opinion No. 00-12, *Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities*, issued October 31, 2000.

[19] NPRM, *supra,* ¶ 17.

about 27% of Verizon's local access line market."[20] Because local competition has developed further in New York than elsewhere in the nation,[21] the Commission should carefully consider New York's experience in the local telecommunications arena. That experience demonstrates the critical importance of UNEs in fostering competition, both directly and as a foundation for facilities-based services.[22]

At the outset, it must be stressed that local competition in New York is still at an early stage. While progress towards competitive markets has been made, Verizon-NY is still the overwhelmingly dominant provider of local services, serving three-fourths of all access lines within its service territory.[23] The remaining one-fourth market share is divided among a number of far smaller CLECs that have not yet demonstrated an ability to affect Verizon-NY's retail

[20] NYSPSC Case 00-C-1945, *supra*, February 2002 NYSPSC Staff testimony, p. 14, lines 15-19.

[21] Nationally, CLECs served 17.3 million of approximately 194 million total telephone lines (8.76%). FCC Report, *Local Telephone Competition Status as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau, February 2002, *http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ lcom0202.pdf*.

[22] The Act authorizes three ways for CLECs to enter local telephone markets: resale (in which CLECs merely rebrand existing ILEC services), UNEs (in which CLECs combine a range of network elements leased from ILECs with other CLEC-provisioned elements) and facilities-based services (in which CLECs supply their own switching and trunks, but may or may not lease ILECs' local loops connecting to customer premises). The New York experience to date has shown that competitors have relied on the resale mode only to a very limited degree. As of January 2002, resale represents only 320,000 lines out of Verizon's 12.2 million lines, a reduction from 405,000 lines a year earlier. NYSPSC Case 00-C-1945, *supra*, NYSPSC Staff testimony, p. 15, lines 13-16. The NYSPSC Staff has found that in New York, "no major carrier uses resale as its sole entry strategy; rather, resale is used to fill in limited market gaps where competitors may have no other viable manner in which to serve customers." *Ibid.*, lines 16-20. It appears that CLECs cannot compete effectively using the resale mode of entry alone.

[23] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 14, lines 15-19.

prices.[24]

A. New York Competitors Depend On The UNE Mode Of Entry To Serve Residential And Small To Medium Business Customers.

1. Residential And Small Business Customers.

The UNE mode of entry is currently of greatest importance in opening New York's local telecommunications markets for the benefit of residential and small business customers. Four CLECs (AT&T, MCI, MetTel and Z-Tel) are the major users of the UNE-platform ("UNE-P"), and together they currently serve 1.8 million lines in New York, mostly used by residential customers.[25] According to the competitors, at present, UNE-P is the only entry strategy that enables competitors to reach mass market customers at an acceptable cost.[26] For example, Z-Tel states that it "can provide these services on a broad and ubiquitous basis only because of the availability of the unbundled network element platform in New York and the other 37 states where it does business."[27]

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[24] This is demonstrated by Verizon-NY's recent decision to increase residential dial tone monthly rates 30% (from $6.11 to $7.96). *See* February 27, 2002 Verizon press release, *Company Announces First Basic Rate Increase In 11 Years*, *http://newscenter.verizon.com/ proactive/newsroom/release.vtml?id=71254&PROACTIVE_ID=cecfc8cfcacbc9cccdc5cec fcfcfc5cecfc7c6c6cecdcbcec8c5cf*.

[25] NYSPSC Case 00-C-1945, Staff testimony, *supra,* pp. 15-16. The UNE-platform is a packaged group of network elements offered by Verizon in New York that is chosen by CLECs who primarily rely on the incumbent's network for the facilities necessary to provide basic local service.

[26] *See, e.g.*, WorldCom April 4, 2002 initial comments, pp. 26-7, 32.

[27] Z-Tel April 5, 2002 initial comments, p. 2.

As a direct result of the availability of the UNE mode of entry, in combination with the NYSPSC's recent TELRIC pricing decision to significantly lower wholesale rates for UNEs, New York residential and small business consumers throughout Verizon's service area can now choose from a number of competing local telephone service offerings.[28] For example, AT&T now offers residential consumers unlimited local calls for $19.95/month.[29] MCI recently launched "The Neighborhood" plan offering New Yorkers unlimited local and long distance, voice mail plus three calling features for $49.99.[30] Z-Tel's $29.99 monthly basic plan includes 1500 local and 30 long distance minutes, call waiting and call forwarding.[31] MetTel offers NYC residents a message rate of $5.94/month plus 9.5¢/local call. Verizon and various CLECs offer additional residential plans designed to meet the calling needs of various types of consumers.[32]

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[28] In a decision on January 28, 2002, the NYSPSC significantly lowered the wholesale rates Verizon-NY can charge CLECs. In that proceeding, the NYSPSC Staff found that the initial UNE wholesale rates (which governed CLEC UNE competition from 1999 through January 2002) "would not sustain a reasonable business plan" and resulted in a "setback" to CLECs' marketing activities in New York and that lower rates would provide competitors "the ability to do business successfully in New York." NYSPSC Case00-C-1945, *supra*, Staff testimony, pp. 18-19.

[29] *See*, *http://www.consumer.att.com/local_service/ny/*.

[30] *See*, *http://www.TheNeighborhood.com/res_local_service/jsps/join_plans.jsp?state=NY&Bus_Ind=RES&wireSolution=Y&group=010&cos=NoCos&ANI=2124168320*.

[31] *See*, *http://www.z-tel.com/portal/ztel/purchase/i/standard_NewYork.jsp*. *See also*, Z-Tel April 5, 2002 initial comments, pp. 1-2.

[32] Additionally, while not state-wide, Cablevision is also "very active" with respect to telephony on Long Island within its cable footprint (*http://www.lightpath.net/inside/news/nr_azznara.html*), as is RCN in serving residential customers in New York City multiple dwellings (*http://www.rcn.com/new_york/ phone/index.htm*), and there are three other localized carriers serving residential markets. NYSPSC Case 00-C-1945, Staff testimony, *supra*, pp. 20-21.

The larger CLECs have also committed to serving small business customers in the wake of the NYSPSC's TELRIC pricing decision.[33]

2. Medium Business Customers.

In New York, a number of small CLECs have established niches serving medium-sized businesses through innovative use of UNEs.[34] Customers can choose from a range of offerings including local and toll voice, data, centrex, Internet access, networking, and special calling features. Z-Tel notes that the NYSPSC's decision, first made in 1998 and extended in 2002, that Verizon-NY must offer UNE-P to customers using up to 18 lines is especially important for CLECs seeking to serve small to medium business customers.[35] The variety of these telecommunications offerings demonstrates the fertile nature of competition fostered by UNEs, which would not be possible if CLECs were forced to depend purely on resale of ILEC wholesale services. Competitors note that through UNE availability, consumer choice is expanded "by allowing [CLECs] to concentrate on areas where they can differentiate themselves from the incumbents (*e.g.*, customer service and product differentiation) while leasing underlying facilities

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[33] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 22, lines 7-12.

[34] *See, e.g.*, Focal Communications, *http://www.focal.com/prod_serv/access_serv.html*, Broadview Networks, *http://www.Broadviewnet.com/Products_Services/Business/VoiceServices .asp?scenario=0*, InfoHighway Communications, *http://www.infohighway.com/serv_local.html,* Z-Tel, *http://www.z-tel.com/portal/ztel/learn/i/zlinebusiness.jsp*, MetTel, *http://www.mettel.net/ business.html*, Time Warner Telecom, *http://www.twtelecom.com/Default.aspx?pageId=34*, and Cablevision Lightpath, *http://www.lightpath.net/solutions/index.html*.

[35] Z-Tel April 5, 2002 initial comments, p. IV. Verizon-NY's agreement to the February 27, 2002 Verizon Incentive Plan extended its April 6, 1998 commitment (made in the Section 271 *Pre-Filing Statement Of Bell Atlantic-New York*) to permit CLECs to use UNE-P in serving multi-line business customers using less than 18 access lines until the end of 2003.

from incumbent LECs."[36]

The major CLECs competing in New York are beginning to show that they are able to and intend to actively compete statewide using New York's recently adopted UNE rates.[37] Thus, UNEs should not be restricted, narrowed, limited or sunsetted at this time.

B. New York Competitors Have Used The Facilities-Based Mode Of Entry To Focus On Large Business Customers.

Medium and large New York businesses have more competitive telecommunications options than do residential and small business customers, especially because they can choose facilities-based CLEC providers.[38] In the NYC metropolitan area, twelve CLECs offer business telephone services, while six CLECs compete with Verizon in Albany, Buffalo and Syracuse.[39] Smaller-sized markets (*e.g.*, Poughkeepsie) generally have three business CLECs.[40] While CLECs now use their own switching facilities to serve 1.2 million New York access lines, this mode of entry still primarily serves large business customers.[41]

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[36] WorldCom April 4, 2002 initial comments, p. 49.

[37] *See, e.g*, the recent statement by AT&T chief Michael Armstrong, "[c]ompetition is beginning to heat up in the local market, at least in some states [referring to New York, Michigan, Illinois, Indiana and Ohio]." *Multichannel News, Armstrong Higher on Phone Competition*, June 17, 2002.

[38] Facilities-based CLECs deploy their own switches, trunks, fiber rings and other equipment to serve customers. Some may connect directly to customer premises with their own lines, while others lease "stand alone loops" (without use of other UNEs) from the ILEC or another CLEC.

[39] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 22, lines 1-6.

[40] *Id*.

[41] *Ibid.*, p. 17, lines 7-9.

C. CLEC Use Of UNEs Can Lead To Greater Facilities-Based Competition Down The Road, Especially For Residential And Small Business Customers.

Continued UNE availability can play a significant role in enabling CLECs to offer facilities-based services to wider market segments. As growing UNE-based customer volumes increase the number of mass-market customers a CLEC serves in a given area, expansion of facilities-based service to serve these consumers becomes more economically feasible.[42]

The Commission has embraced the goal of advancing the development of facilities-based competition, which can lead to more innovation and the availability of new products and services at different prices.[43] Residential and small business customers would benefit greatly from facilities-based competition if it were able to expand so as to serve them as it now serves larger business customers. So long as CLEC mass market customers are served primarily by UNEs, they will remain dependent upon ILECs' network maintenance practices and repair service

[42] In this regard, the argument put forward by some commenters that CLEC reliance on UNEs prevents them from investing in their own facilities, and also discourages ILECs from making investments in equipment it must lease to competitors is not consistent with the facts. *See, e.g.*, April 5, 2002 initial comments by Progress & Freedom Foundation, pp. 15-30; April 5 initial comments by the Verizon Telephone Companies, pp. 25-37. The $56 billion in facilities investment by CLECs (*The State of Local Competition 2001*, The Association for Local Telecommunications Services, February 2001, p. 20) and $100 billion by ILECs since the Act's passage (FCC ARMIS Report 43-07, 1996-2000) demonstrates that "a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities." *Verizon v. FCC, supra*, at 1676, *fn.* 33. CLECs have made considerable investment in local switching facilities. *See* AT&T April 5, 2002 comments, pp. vii, 66-67. UNE availability has not prevented ILEC investment in new facilities. For example, in New York, Verizon invested approximately $2.1 billion in its telecommunications network during 2000 and its network investment since 1995 now totals more than $10.2 billion.

[43] *UNE Remand Order, supra*, ¶ 110.

quality (since ILEC facilities and crews are responsible for the switches, trunks and loop distribution plant leased by CLECs). CLECs using their own switch, fiber rings and trunking facilities would be able to offer more competitive pricing and service performance, increasing consumer value.

The CLECs have argued convincingly that they desire to avoid dependence upon their ILEC competitor's facilities wherever it is possible to do so economically.[44] In addition, the Supreme Court recently recognized that "the desirability of independence from an incumbent's management and maintenance of network elements" are "incentives for competitors to build their own network elements."[45] Before CLECs will consider migrating UNE-served customers to their own switches, there must be sufficient volume and density of customers to make the change cost effective. Without the UNE mode of entry, CLECs will not be able to gather sufficient mass market customers to justify the cost of installing switches to serve residential and small business markets. Thus, continued availability of UNEs promotes the growth of facilities-based competition.

If the FCC decides to curtail its UNE requirements now, local service competition will be severely undermined, especially for residential and small business customers who rely heavily on UNEs to reap the benefits of competition. It would be worse than ironic if the new wholesale

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[44] "To serve residential customers, AT&T has invested billions of dollars in alternative facilities ... to avoid complete dependence on ILEC facilities." AT&T April 5, 2002 initial comments, p. v. *See also* WorldCom April 4, 2002 initial comments, p. 6: "Because companies prefer the control and flexibility that come with owning their own facilities, they can be expected to build, rather than buy, as long as they earn a reasonable return on their investment."

[45] *Verizon v. FCC, supra,* at 1670.

UNE rates recently set by the NYSPSC and other state commissions[46] were *de facto* nullified by a FCC policy decision that ILECs need not continue to make UNEs available. All of the labor that went into the various state UNE ratemaking proceedings would be for nought, and the prospects for sustainable local competition would be set back dramatically.

The New York experience since passage of the Act indicates that UNEs remain important to the process of transforming monopoly markets, especially for residential and small business customers. Continued availability of UNEs is necessary to establish strong roots from which robust local competition can grow.

II. State Regulators Should Retain Flexibility To Tailor UNE Options To Meet Local Conditions And Consumers' Needs.

The NPRM asks what role state regulators should have in determining the list of UNEs that ILECs must make available to CLECs.[47] Currently, FCC interprets § 251(d)(3) of the Act to permit it to establish a minimum list of nationally available UNEs, which can be added to by individual state regulatory bodies. This policy recognizes that local conditions vary from state to state, and even within individual states, and allows a flexible approach to take these differences

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[46] *See, e.g.*, NYSPSC Case 98-C-1357, *supra, Order On Unbundled Network Element Rates*, issued January 28, 2002. *See also* Massachusetts D.T.E. 01-20, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts= Resale Services in the Commonwealth of Massachusetts*, commenced January 12, 2001 and New Jersey Board of Public Utilities, Docket TO00060356 -*In the matter of the Board's review of unbundled network elements rates, terms and conditions of Bell Atlantic-New Jersey , Inc., Decision and Order* issued November 20, 2001.

[47] NPRM at ¶¶ 75-76.

into account. This has proven to be very useful and effective in moving local telecommunications markets towards competition. For example, as noted, the NYSPSC has determined that small businesses using up to 18 lines should be treated in the same way as residential customers for the purpose of making UNEs available to CLECs,[48] thus helping to jumpstart competition aimed at small business customers.

In light of the major role that small businesses play in local, state and national economies, New York's experience demonstrates the wisdom of the Commission's policy allowing state-level modifications of the national UNEs list. State regulators are often best positioned to take local and regional conditions into account. Therefore, the NYSAG supports the initial comments of NYSPSC and other state regulators and consumer advocates who call for preservation of this effective federal-state partnership.[49]

III. The Commission Should Continue To Require ILECs To Make The High-Frequency Portion Of Loops Available To Competitors Offering DSL Service To Consumers.

The NPRM seeks comments on whether current UNE requirements regarding the provision of DSL[50] advanced services by CLECs using ILEC facilities should be continued.[51] As

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[48] *See* NYSPSC April 4, 2002 comments, p. 2. *See also* NYSPSC Case 00-C-1945, *Order Instituting Verizon Incentive Plan, supra,* p.15.

[49] *See, e.g.*, April 4, 2002 NYSPSC initial comments, p. 8; April 5, 2002 initial comments of Illinois Commerce Commission, pp. 3-4; and April 5, 2002 joint initial comments of Pennsylvania Office of Consumer Advocate, Ohio Consumers' Counsel, New Hampshire Office of Consumer Advocate, West Virginia Consumer Advocate Division and Maryland Office of People's Counsel, pp. 4-15.

[50] DSL technology allows high-speed Internet data transfer to be provided over the local copper loops connecting end users with the ILEC central office switch. While it is available in several versions, the asynchronous ("ADSL") one is used primarily by residential customers.

discussed more specifically in NYSAG's comments filed in the Commission's companion wireline broadband proceeding,[52] widespread broadband Internet access is important to the economic future of New York communities, large and small.

The NYSAG supports policies that encourage deployment of facilities to bring high-speed Internet access to all consumers and businesses at the earliest possible time. Policies promoting competition in the market for broadband access will speed such deployment and enhance the growth and development of competitive local voice markets as well. The Commission has correctly found that competitors seeking to offer DSL services are "impaired" within the meaning of § 251(d)(2) of the 1996 Act without access to line sharing arrangements with ILECs' local loops,[53] and that ILECs should be directed to provide CLECs with access to the high-frequency portion of these loops.[54] The Commission should not now alter this DSL

ADSL uses the high-frequency bandwidth of the line for data traffic while the low frequency bandwidth simultaneously delivers voice communications. Thus, residential customers can get both telephone service and Internet broadband using a single telephone line.

[51] NPRM, ¶¶ 22-30, 53-54.

[52] CC Docket 02-33, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, *et al.*, July 1, 2002 Reply Comments of NYS Attorney General Eliot Spitzer.

[53] *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Fourth Report and Order on Reconsideration in CC Docket 96-96*, 16 FCC Rcd 2101.

[54] *Line Sharing Order, supra*, 14 FCC Rcd at 20926, ¶ 25. Because simple voice communication uses only a small portion of the bandwidth that a copper loop can carry, use of electronic devices called "splitters" allow a single loop serving a customer to be used simultaneously for voice service (using the low frequency spectrum) and for Internet access and other data transmission (over the higher frequency spectrum).

policy, which serves the goals and requirements of the Act to promote competitive markets for all telecommunications services.

A. Access To DSL UNEs Will Contribute To The Growth Of Facilities-Based Competition.

In addition to being required by the 1996 Act, CLEC access to DSL UNEs can be of critical importance to the continued growth of facilities-based local telephone competition.

Many consumers are responsive to providers able to offer "one-stop shopping" with multiple services bundled together at attractive rates and paid for with a single bill.[55] This is demonstrated by Verizon-NY's rapid success in gaining the largest share of New York long distance lines in a mere two years through offers which combine local, regional and long distance services.[56] CLECs hoping to progress to switch-based competition will be better able to do so if they can increase their customer base by bundling local, long distance and DSL services, just as New York ILECs can do.

CLEC ability to offer bundled voice and DSL services would increase economies of scale and operating margins. By increasing the number of potential customers and their resulting revenues per-switch, CLEC entry into DSL will potentially accelerate switch-based facilities investment by CLECs.[57]

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[55] *See, e.g.,* Verizon November 5, 2001 release, *Verizon and Verizon Wireless Team Up to Offer the Convenience of Single Bill for All Services: New York and Massachusetts Customers Can Now Receive Consolidated Bill for Local, Long-Distance and Wireless , http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=64954.*

[56] Since first offering long distance to New York customers in January 2000, Verizon has gained "nearly a third of the market." *Crain's New York Business*, January 17, 2002.

[57] *See, e.g.*, AT&T April 5, 2002 initial comments, p. v.

B. The Commission Should Also Require ILECs To Allow Their DSL Customers To Choose Competitors' Voice Service Offerings.

The Commission should require that ILEC DSL offerings be available to customers who choose CLEC voice services.[58] Currently, ILECs tie their DSL offerings to their voice service, so that customers seeking an ILEC's DSL offering cannot obtain voice service from a CLEC on the same shared line. This limitation will likely inhibit the growth of local voice competition and should not be allowed to continue.

Many consumers may not wish to give up their existing ILEC-provided DSL service in order to select a competitor's voice service; they will therefore reluctantly stay with the ILEC for voice as well as DLS services. As ILEC DSL customers grow in numbers, customers' inability to keep their ILEC DSL service would become a significant barrier to local voice competition.[59]

ILECs' current dominance in both local voice and DSL markets thus threatens to become a barrier to developing robust competition in local telephone markets. To ensure that local voice competition can continue to grow, the Commission should remove this impediment to customer

[58] Substantial regulatory progress has been made in New York towards opening Verizon-NY's network to permit DSL competition. The NYSPSC has thus far implemented the 1996 Act and FCC rulings by requiring Verizon-NY to unbundle the high-frequency portion of the loop so that CLECs can provide DSL service to ILEC voice customers (line-sharing) or to CLEC voice customers (line-splitting). The NYSPSC has also required Verizon-NY to permit CLECs to provide DSL service to customers served from Verizon-NY's remote terminals that are connected to Verizon-NY's central office by fiber optic cable instead of copper wire. The NYSPSC accomplished this by mandating that CLEC-owned digital subscriber line access modules (DSLAMs) and splitters may be located in Verizon-NY's remote terminals upon CLEC request. NYSPSC April 4, 2002 initial comments, p. 7.

[59] It should also be noted that early users of new DSL services are more likely than the population at large to be innovation seekers who would also be interested in CLECs' new voice service options.

choice and should no longer permit ILECs to wield their market power by precluding their DSL customers from choosing alternate voice service providers.

CONCLUSION

For all the reasons stated herein, the Commission should stay the present course regarding UNEs. Local market competition is only beginning to be established, and even in places like New York where CLECs have gained the greatest foothold, their share is tenuous, especially for residential and small business customers.

Any policy decision that would narrow or terminate UNE availability or prolong uncertainty in this industry is likely to severely damage these nascent markets and thereby hurt consumers. By continuing to make available the current list of voice and DSL UNEs for at least several more years, the Commission would strengthen local competition and lay the necessary economic foundation upon which CLECs will be able to expand with network facilities of their own.

Finally, the Act's goals of robust local competition, maximization of facilities investment and broadband deployment can best be accomplished through continued cooperative policies that enlist state regulators in applying local conditions to fine-tune national UNE policies.

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